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No. 87-936

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

MARY M. WITTEMAN,
Petitioner,

VS.

JACK BARRY CABLE TV,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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List of Corporate Parties, Parents, Subsidiaries and affiliates as required by Rule 28.1:

American Cablesystems Corporation
American Cablesystems of California, Inc.
Continental Cablevision, Inc.

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SUMMARY OF ARGUMENT

No basis of jurisdiction exists for granting the Petition for Writ of Certiorari ("Writ Petition") filed by Petitioner Mary Witteman ("Petitioner"). Petitioner originally sued Respondent Jack Barry Cable TV ("Respondent") for trespass, claiming that the apportionment to Respondent of the right to utilize easements located at the rear of Petitioner's backyard was contrary to law. Respondent successfully moved for summary judgment, arguing solely that the easements were properly apportionable to Respondent under common law principles.

On appeal, the primary arguments of both parties continued to focus on whether the easements were properly apportionable to Barry at common law. Petitioner

also argued, however, for the first time, that if apportionment was *not* permitted at common law, then California Government Code § 53066 (which also permits apportionment) was unconstitutional.[1] The California Court of Appeal agreed with Respondent that California common law permitted the easements to be apportioned, and neither reached nor discussed the constitutionality of Government Code § 53066. Because the Court of Appeal's decision rested upon an adequate and independent state ground, this Court does not have jurisdiction to decide the intricate details of California property law presented by this case.

Even Petitioner agrees that the state property law question of the apportionability of in gross easements is independent of ("prior to") any federal "takings" question. Writ Petition at 9. Petitioner, however, contends that this Court should review the Court of Appeal's decision on the ground that no fair and substantial basis exists for its determination of California common law principles. This argument ignores the fact that the decision of the California Court of Appeal is completely consistent with and heavily relies upon other California authorities *and* is consistent with the vast majority of other states' opinions dealing with this same issue. Petitioner's complaint that no "fair and substantial" basis

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[1]Petitioner now argues that the Court of Appeal's reliance on common law grounds somehow "[r]epresents [a]n [a]ttempt to [a]void the [f]ederal [q]uestions [r]aised by California Government Code § 53066 and by 47 U.S.C. 541(a)(2)." Writ Petition at 9. This stands on its head the argument in the California Court of Appeal, where the briefs of both parties primarily discussed the propriety of apportionment at common law. Indeed, 47 U.S.C. § 541(a)(2) was mentioned only once, in passing, in Petitioner's Opening Brief in the California Court of Appeal, and not at all in her Reply Brief in that court.

exists for the Court of Appeal's holding thus reduces to the fact that she disagrees with the ruling.

STATEMENT OF THE FACTS[2]

In 1929, one of Petitioner's predecessors-in-interest granted to the City of Los Angeles ("the City"), and its successors and assigns, the permanent easement and right of way "to construct, reconstruct, maintain and operate" poles, lines and fixtures for the transmission of electrical energy over and across the rear four feet of Petitioner's property (the "1929 City Easement"). In 1978, the City enacted Los Angeles Ordinance 151,016 whereby it granted Respondent a cable television franchise covering a portion of the City which includes Petitioner's property. Ordinance 151,016 permits Respondent to use, among others, the 1929 City Easement to install and maintain its cable television wire.

In 1957, another of Petitioner's predecessors-in-interest quitclaimed to General Telephone Company of California ("GTC"), and its successors and assigns, an easement (the "1957 GTC Quitclaim Easement") over the rear five feet of Petitioner's property for "constructing, adding to, maintaining, removing and repairing"

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[2]Much of the Statement of Facts set forth in the Writ Petition consists of "facts" which were not before the trial court when it granted summary judgment in Respondent's favor nor before the Court of Appeal when it affirmed the trial court. Petitioner asserts here that certain of these factual matters should have been considered by the trial court notwithstanding the tardy filing by Petitioner of her papers in opposition to Respondent's summary judgement motion. Writ Petition at 7, n. 3. The propriety of the trial and appellate court's refusal either to consider Petitioner's late filed declarations, or to judicially notice (as Petitioner requested) the manner in which her particular backyard easements have been utilized over the years, are questions purely of state law.

poles and lines for the transmission of electrical energy and for telephone lines. In July, 1979, GTC and Respondent entered into a pole lease agreement pursuant to which GTC granted Respondent permission to attach its cable television wire to GTC's poles.

In 1958, Petitioner and her husband (her counsel of record here) acquired title to the property. The deed, however, included a specific reservation in the grantor with respect to the easements over the rear five feet. Petitioner is permitted to use only the surface of the rear five feet "provided such use does not interfere with the installation, operation, or maintainance" of the easements.[3]

Sometime after July 1979, Respondent caused its wires to be strung across Petitioner's property within both the 1929 City Easement and the 1957 GTC Quitclaim Easement. The wire, which is within inches of Petitioner's rear property line, is attached to GTC poles which are located on the property of Petitioner's neighbors. It is one of numerous telephone and electric wires crossing her property in the same narrow strip of land at approximately the same height. Its presence there is permitted under established California common law property principles, which permit the apportionment to Barry of the existing easements.

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[3]The declaration referred to at Writ Petition 6, n. 2, with respect to the reservation in the 1958 deed, was not before the trial or appellate court. *Russell v. Southard*, 53 U.S. (12 How.) 139, 157, 13 L.Ed. 927, 935 (1851) ("This court must affirm or reverse upon the case as it appears in the record"). Moreover, the effect of the events set forth in that declaration merely raises yet another state law question.

REASONS WHY THE PETITION SHOULD BE DENIED

A. The California Court of Appeal Decision Rested on Independent and Adequate State Ground.

It has long been a settled rule of this Court's jurisdiction that "where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller,* 296 U.S. 207, 210, 56 S. Ct. 183, 184, 80 L. Ed. 158 (1935); *see also* R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice* § 3.1 at 107 (6th Ed. 1978) ("However, if that judgment [of the highest state court] can be said to rest on adequate nonfederal grounds, despite the presence of a substantial federal question, Supreme Court review is unavailable under § 1257 either by appeal or certiorari"). As this Court has noted, "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate and independent grounds, we, of course, will not undertake to review the decision." *Michigan v. Long,* 463 U.S. 1032, 1040-41, 103 S. Ct. 3469, 3476, 77 L. Ed. 2d 1201 (1983).[4]

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[4] *State ex rel. Anderson v. Brand,* 303 U.S. 95, 58 S. Ct. 443, 82 L. Ed. 685 (1938), cited by Petitioner, is of course consistent with this rule. The state court there could have based its decision on a state ground, but did not do so, choosing instead to rely on the ground that the act complained of did not impair the relevant contract within the meaning of the federal constitution. *Id.* at 98, 58 S. Ct. at 445. After concluding that the state court had wrongly decided the federal

Petitioner concedes that if either of the easements is properly apportionable at common law, then no federal question exists for review by this Court.[5] Although below Petitioner made various arguments going to the scope of the easements, these arguments do not seem to be made here. Instead, Petitioner argues here that the easements are apportionable at common law only if they are "exclusive"; that these easements are not "exclusive"; and that therefore the state court so erred in applying basic California property law as to constitute a taking in violation of the federal Constitution.[6]

The decision of the California Court of Appeal with respect to the apportionability of the easements at common law was not novel, but accords with traditional common law property principles. The Court of Appeal held that, pursuant to these principles, the easements were "'exclusive' vis-a-vis their grantors who had no intention to provide utility services, and no management or control rights concerning the utility's easement use." Because the easements were exclusive, they could be apportioned to Respondent. *See Witteman v. Jack Barry Cable TV,* 183 Cal.App.3d 1001, 1007, 228 Cal.Rptr. 584, 588 (1986). This holding is not only adequate and independent of federal law, it eliminates the need to consider the federal question whether a California statute, or

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question, this Court remanded the case to the state court so as to allow it to consider the state question.

[5]"[T]he state law issue of the easements' scope (including their apportionability) is prior to the federal taking issue." Writ Petition 9.

[6]At Writ Petition 3, Petitioner identifies the Fifth Amendment as the constitutional provision which is violated. The Fifth Amendment, of course, only applies to action by the federal government, not by a state government. Respondent assumes that Petitioner intended to refer to the Fourteenth Amendment.

federal statute, which authorize a city to apportion a public easement to a cable franchise violates the federal Constitution.

Petitioner apparently understands that the common law grounds for the appellate court's holding is a very serious hurdle. Accordingly, almost all of her Writ Petition focuses on whether the interpretation and application of state common law is so unfair and erroneous that it is simply fluff that ought to be disregarded so that this Court can deal with the "real" issues, i.e., whether in the absence of common law sanction state or federal statutory law can justify the presence of Barry's wire in the easements.[7]

B. The Court of Appeal Decision Had A Fair and Substantial Basis Under California Law.

So long as a state court bases its decision upon state law, this Court will not "inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court." *Broad River Power Co. v. State of South Carolina,* 281 U.S. 537, 541, 50 S. Ct. 401, 403, 74 L. Ed 1023 (1930). This Court's review is limited to ensuring that the state court is not attempting to evade its constitutional obligations. *E.g., id.*

No such evasion has occurred.[8] The Court of Appeal's holding that the 1929 City Easement is exclusive and

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[7]Because Petitioner's Writ Petition is so preoccupied with the state common law grounds for the appellate court's decision, she almost totally ignores the statutes which she contends would be unconstitutional were they the basis (which they are not) for the appellate court's decision.

[8]The appellate court's heavy reliance on traditional common law principles is readily apparent from its decision. "*Salvaty* also relied

therefore apportionable is identical to the leading California case to discuss the apportionability of in gross easements for the transmission of cable signal. *See Salvaty v. Falcon Cable Television,* 165 Cal.App.3d 798, 804, 212 Cal.Rptr. 31 (1985) (permitting telephone company to apportion backyard easement to cable company, decided prior to *Witteman*). Moreover, the analysis employed is fully consistent with traditional law, as redacted in the Restatement of Property:

> Though apportionability may be to the disadvantage of the possessor of the servient tenement, the fact that he is excluded from making the use authorized by the easement, plus the fact that apportionability

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on . . . *Hoffman v. Capital Cablevision Systems, Inc.* . . . which had . . . turned to the legal principles set forth in 5 Restatment of the Law, Property, section 493, particularly subdivisions (c) and (d). *Hoffman* ascertained that such easements were easements in gross, exclusive vis-a-vis the grantor, and thus apportionable. . . . We note that in California easements involving the right-of-way have been considered 'easements in gross' since 1872. . . . Easements conveyed to public utilities are in the same category. They have been deemed 'exclusive' vis-a-vis their grantors who had no intention to provide utility services, and no management or control rights concerning the utility's easement use. This factor, in turn, has led to the conclusion of apportionability, without obtaining any consent of the holder of the servient estate [i.e., the homeowners]. . . . Rejecting the argument of nonexclusivity, the court [in *Savaty*] stated that 'Thus, insofar as it related to the apportionability of an easement in gross, the term 'exclusive' *refers to the exclusion of the owner and possessor of the servient tenement from participation in the rights granted,* not to the number of different easements in and over the same land.' . . . While *Salvaty* did not expressly rely on either Government Code section 53066 or Public Utilities Code section 767.5, basing its decision on basic traditional real property law, these statutes afford additional ground for recognizing apportionability and reflect the legislative understanding of the common law rules and their applicability to the expansion of cable television services." *Witteman,* 183 Cal.App.3d at 1007-1009 (emphasis in original).

> increases the value of the easement to its owner, tends to the inference in the usual case that the easement was intended in its creation to be apportionable. This inference is very strong in cases where an increase in use is in fact advantageous to the possessor of the servient tenement.

5 Restatement of Property, § 493 comment e (1944) (emphasis added).

The Court of Appeal's opinion is also consistent with decisions by courts outside of California which have considered apportionment of electrical or telephone easements to cable companies. *See Henley v. Continental Cablevision*, 692 S.W.2d 825, 827 (Mo. Ct. App. 1985) ("We believe the very nature of the 1922 easements obtained by both utilities indicates that they were intended to be exclusive and therefore apportionable"); *Hoffman v. Capitol Cablevision Systems*, 383 N.Y.S.2d 674, 676, 52 App. Div. 2d 313 (1976) ("Whether an easement in gross is apportionable depends largely on whether it is viewed as exclusive as opposed to nonexclusive . . . . [T]he very nature of the said 1954 easements obtained by the utilities indicates that they were intended to be exclusive,vis-a-vis the grantor"); *see also Clark v. El Paso Cablevision*, 475 S.W. 2d 575 (Tex. Civ. App. 1971) (affirming preliminary injunction enjoining homeowner from interfering with cable company's wire that was placed in public easement and upon a utility's pole where both the city and the utility allowed it to use their respective easements).[9]

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[9]Moreover, every court that has examined the issue has agreed with the conclusion reached by the California Court of Appeal that the existence of two easements is irrelevant to whether the easement is exclusive within the meaning of the common law. *See, e.g., Henley v. Capitol Cablevision System*, 692 S.W.2d at 829; *Hoffman v. Capitol Cablevision System*, 383 N.Y.S.2d at 678. The existence of two ease-

Ignoring Salvaty, the Restatement's redaction of well-accepted common law, and other states' decisions, Petitioner claims that there is no substantial basis for the Court of Appeal's opinion because it failed to address *Pasadena v. California-Michigan Land & Water Co.*, 17 Cal. 2d 576, 110 P.2d 983 (1941), which Petitioner insists supports her contention that the City's easement is not exclusive. The mere failure of a state court to discuss every case and every argument raised by the parties, however, does not render its decision without a fair and substantial basis. If such were the test, the independence of state courts could be destroyed and this Court would be forced to weigh and consider an endless number of state opinions to determine whether a state court should have considered them. That is neither the law nor the function of this Court.

Moreover, *Pasadena* is consistent with the analysis employed by the Court of Appeal and with the *Restatement*. The difference in results between *Pasadena* and the present case is occasioned by the difference in relevant facts, as to which Petitioner's Writ Petition is silent.[10]

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ments is particularly irrelevant here since the second easement was a *quitclaim* easement granted 30 years after the 1929 City Easement and involved wholly different parties. (Not surprisingly, nowhere in the Writ Petition does Petitioner reveal that the 1957 grant to GTC was by way of quitclaim.)

[10]At Writ Petition 11, n. 8, Petitioner contends that the basis for Respondent's argument that *Pasadena* is distinguishable is that "it involved water and not electricity, and that it concerned an easement in an unincorporated area of Los Angeles." As will be developed in the text, this is hardly a full and truthful statement of Respondent's position, which has been fully briefed on a number of prior occasions. *See, e.g.*, Brief of Respondent Jack Barry Cable T.V., filed in the Supreme Court of the State of California on February 27, 1987, at 65-70.

In *Pasadena*, the owner of the servient estate granted to defendant California-Michigan Land and Water Co., a water vendor, an easement to run certain water pipes on its land. 17 Cal. 2d at 585, 588 (dissent). Thereafter the servient estate granted to plaintiff City of Pasadena, a competing water vendor, the right to run water pipes in certain strips of its land, part of which coincided with the earlier grant to defendant California-Michigan. *Id.* at 585 (dissent). Finally, the servient estate granted to defendant California-Michigan the right to run water pipes in the same strips of land with respect to which it had previously granted rights to plaintiff City of Pasadena. *Id.* at 577. All apparently conceded that the servient estate also had the right to lay water pipes for its own use in the same strips of land. *Id.* at 592 (dissent). Prior to the litigation, plaintiff City of Pasadena had used its pipes in the easement to service about 24 consumers. *Id.* at 585 (dissent). Defendant California-Michigan, by installing its pipes in the same easement, had managed to obtain 22 of these customers. *Id.* at 586 (dissent).[11] Needless to say, based on these facts there was no real contention that *any* of these easements was exclusive.

> [A]ppellant [plaintiff City of Pasadena] does not make a serious claim that there was an intention to make this an exclusive easement; and any such intention would seem clearly contrary to the admitted facts, since prior easements in the same land [for the competing water lines of defendant California-Michigan Land and Water Co.] were in effect at the time when appellant's easements were granted.

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[11]Witteman, in her Writ Petition at 3, 9 and elsewhere, describes the easements in *Pasadena* as "public utility easements." *Pasadena* does not employ this phrase, but rather emphasizes that the easement owners were competitors.

Id. at 578. Instead, the "primary contention [was] that the easements granted to the defendant [California-Michigan] interfered with [the plaintiff's full enjoyment of its] prior easements as a matter of law." 17 Cal. 2d at 578. The Court rejected the contention and found for the defendant (California-Michigan) easement owner.

> Considering the fact that these easements were granted [to plaintiff City of Pasadena] for the limited purpose of securing domestic water service for the individual owners in this real estate subdivision and that no indication appears that the parties intended to protect the city against competition, we are unable to find any intent, either expressed or implied, that the owners were never to grant similar easements to anyone else.

Id. at 581.

The facts of the present litigation are very different from those found in *Pasadena;* accordingly, application of the black letter law redacted by the *Restatement* produces an entirely different result.[12] In *Pasadena,* all conceded that the owner of the servient estate could use the easements to run competing water lines. 17 Cal. 2d at 592. Here, Petitioner is "excluded from making the use authorized by the easement" (5 *Restatement of Property,* § 493 comment c) both as a matter of law and practical-

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[12]The *Restatement* provides that "the fact that [the owner of the servient tenement] is excluded from making the use authorized by the easement . . . tends to the inference in the usual case that the easement was intended in its creation to be apportionable." 5 *Restatement of Property,* § 493 comment c. In *Pasadena,* the owner was not excluded from making the use authorized by the easement, and indeed competitors for those same services were always envisioned and indeed already had overlapping easements. There was thus no basis to infer exclusivity.

ity.[13] In *Pasadena,* an easement to run water pipes in the same land had been granted to defendant even before plaintiff obtained that right. In the present case, no easement for electricity preceded the 1929 City Easement, and no easement for telephone preceded the 1957 GTC Quitclaim Easement. In *Pasadena,* the plaintiff's easement was obtained in order to compete for a limited number of consumers, and competition was always envisioned. Here, no such competition was ever permissible as a matter of law, and indeed Petitioner has herself contended throughout this litigation that the provision of both telephone and electrical services are "natural monopolies" (*see, e.g.,* Petitioner's Opening Brief in the Court of Appeal at 29:5-7). For these reasons, *Pasadena* is

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[13]Petitioner has never disputed that the provision of electrical services within Los Angeles has at all relevant times been done by monopolies established or franchised by the City. *See* California Constitution, Art. 11, § 19 (providing since 1879 that municipalities could establish public works for the provision of electricity); Stats. 1915, Ch. 660, at 1300-01 (providing, among other things, for cities to grant franchises for the "erect[ion of] poles or wires for transmitting electricity"); Charter of the City of Los Angeles, Art. XXII, § 220(1) (enacted in 1924 and providing to the Department of Water and Power "the power and duty . . . [t]o construct, operate, maintain, extend, manage and control works and property for the purpose of supplying the city and its inhabitants with . . . electric energy"). Similarly, Petitioner has never disputed that the expense of providing electric service, the difficulties of access, and the dangers inherent in creating competing sets of poles and electrical wires also dictate that this service be exclusively provided by monopolies. Because of these inherent dangers and the difficulties of access, the height of and distance between the various wires has at all times relevant to this litigation been governed by law (*see* California Public Utilities Commission, *General Order No. 95,* Rules for Overhead Electric Line Construction, Rules 37 and 38, promulgated in 1941 and replacing General Order 64-A, issued in 1928), thus making it impossible for competing wires to be constructed within a single four foot strip of land such as the 1929 City Easement.

not inconsistent with the Court of Appeal's decision below; to the contrary, each applies the identical well settled law but reaches different results because the facts are different.

C. Petitioner Cannot Create Jurisdiction by Claiming that the Court of Appeal's Decision by Itself Constitutes a "Taking."

As discussed above, the Court of Appeal's decision is completely consistent with California common law principles with respect to the circumstances under which easements are apportionable. But even if the opinion were a break with controlling California common law precedent, Petitioner has presented no authority — save the concurring opinion of a single Justice which has never been the basis of any holding by this Court — that a judicial opinion setting forth "a sudden change in state law" can itself represent a "taking" under the Fourteenth Amendment.

Petitioner's contention is similar to the contentions, long since rejected, that legislative actions regulating property which changed the law were takings, *see Munn v. Illinois,* 94 U.S. 113, 24 L. Ed. 77, 87 (1877), and should be similarly rejected. Whether a court's decision represents a change in the law has never been the constitutional test. For example, in *Robins v. PruneYard Shopping Center,* 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), the California Supreme Court completely reversed a decision reached only five years earlier and held that a private shopping center could not exclude individuals. The fact of the reversal played no part in this Court's analysis as to whether the prohibition on exclusion constituted a taking. *See PruneYard Shopping Center v. Robins,* 447 U.S. 74, 78, 100 S. Ct. 2035, 2039, 64 L. Ed. 741 (1980). Yet, under Petitioner's excessively restrictive

view of a state's ability to fashion its own law, that fact alone would be conclusive.

CONCLUSION

For each of the foregoing reasons, Respondent respectfully urges this Court to deny the Petition for Certiorari.

Respectfully submitted,

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